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Supreme Court, U.S.
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IN THE

Supreme Court of The United States

OF AMERICA
OCTOBER TERM, 1988

No. _____

RAYMOND B. RHONE, JR.,

Petitioner

v.

PRESTON R. TISCH,
POSTMASTER GENERAL,
UNITED STATES POSTAL SERVICE,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI FROM THE U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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January, 1989

43 pp

QUESTIONS PRESENTED

1. In a Title VII sex discrimination action, should waiver, tolling or equitable estoppel be applied against the government to excuse petitioner's requirement to exhaust administrative remedies where government employees erred in omitting the sex discrimination charge after Petitioner notified them of the sex discrimination claim at the informal complaint stage?

2. In a Title VII sex discrimination action, is summary judgment warranted when the Petitioner establishes that disparate treatment for similar conduct occurred based on gender?

PARTIES BELOW

The parties to this action include Raymond B. Rhone, Jr., the Petitioner and Preston R. Tisch, Postmaster General, United States Postal Service, Respondent.

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THE SUBSTANTIAL QUESTION IS THAT THE LOWER COURT MISINTERPRETED THE OBJECTIVE OF THE STATUTE AND PERMITTED INJUSTICE BY REQUIRING IN THE NAME OF EXHAUSTION MORE OF PETITIONER THAN HE HAD ALREADY DONE..... 11

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ONCE THE INFERENCE OF RACIAL DISCRIMINATION EXISTS, THERE ARE GENUINE ISSUES OF MATERIAL FACT AS TO THE REAL REASONS FOR THE DISCHARGE AND SUMMARY JUDGMENT IS NOT WARRANTED. THE RESPONDENT MUST BE AFFORDED THE OPPORTUNITY TO ARTICULATE HIS LEGITIMATE, NON-DISCRIMINATORY REASON FOR THE DISCHARGE AND, MOST IMPORTANTLY, THE PETITIONER MUST HAVE THE OPPORTUNITY TO DEMONSTRATE THAT THE RESPONDENT'S PROFFERED REASONS

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Raymond B. Rhone, Jr., appeals from a judgment issued by the U.S. Court of Appeals for the Sixth Circuit on November 1, 1988. This writ of certiorari is submitted to show that this Court has jurisdiction of this appeal and that the appeal presents substantial questions regarding Title VII sex discrimination.

OPINION BELOW

The Court of Appeals for the Sixth Circuit affirmed the order of the District Court for the Northern District of Ohio granting summary judgment to Preston Tisch, Postmaster General, U.S. Postal Service (Respondent), regarding sex discrimination.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on November 1, 1988. Jurisdiction of this court is invoked under 28 U.S.C. Section 1254 (1). The Notice of Appeal was filed in the U.S. Court of Appeals for the Sixth Circuit on January 19, 1989.

STATUTORY PROVISIONS INVOLVED

Section 717 (a) of Title VII of the 1964 Civil Rights Act, as amended, 42 U.S.C. §2000e-16(a), provides:

All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code, in executive agencies (other than the General Accounting Office) as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds) in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions

in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

Section 717 (c) of Title VII of the 1964 Civil Rights Act, as amended, 42 U.S.C. §2000e-16(c), provides:

Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection 717 (a), or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex, or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee of applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 706, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

29 CFR Sec. 1613.218

(b) Arrangements for hearing. The agency in which the complaint arose shall transmit the complaint file containing all the documents described in §1613.222 which have been acquired up to that point in the processing of the complaint, including the original copy of the investigative file (which shall be considered by the Administrative Judge in making his recommended decision on the complaint), to the Administrative Judge who shall review the complaint file to determine whether further investigation is needed before scheduling the hearing. When the Administrative Judge determines that further investigation is needed, he shall remand the complaint to the Director of Equal Employment Opportunity for the appearance of witnesses necessary to supply the needed information at the hearing. The requirements of § 1613.216 apply to any further investigation by the agency on the complaint. The Administrative Judge shall schedule the hearing for a convenient time and place.

(c) Conduct of hearing. (1) Attendance at the hearing is limited to persons determined by the Administrative Judge to have a direct connection with the complaint.

(2) The Administrative Judge shall conduct the hearing so as to bring out pertinent facts, including the production of pertinent documents. Rules of evidence shall not be applied strictly, but the Administrative Judge shall exclude irrelevant or unduly repetitious evidence. Information having a bearing on the complaint or employment policy or practices relevant

to the complaint shall be received in evidence. The complainant, his representative, and the representatives of the agency at the hearing shall be given the opportunity to cross-examine witnesses who appear and testify. Testimony shall be under oath or affirmation.

STATEMENT OF THE CASE

Petitioner, Raymond B. Rhone, Jr. (Rhone) initially became employed as a mail handler with the Cleveland, Ohio, General Mail Facility in 1968. During the sixteen years of his employment, Petitioner had a good record as an employee, and received no discipline. In late 1983 and early 1984, it came to the attention of Respondent's inspectors that a number of employees were engaging in gambling on postal premises. Respondent's inspectors conducted an investigation and several employees were identified as participants. Petitioner received a Notice of Removal letter dated March 26, 1984, terminating his employment effective April 30, 1984, for the offense of gambling on postal premises in violation of Chapter 661.56 of the Postal Service's Code of Ethical Conduct.

Petitioner filed a grievance through the union, the National Post Office Mailhandler, Watchmen, Messengers, and Group Leaders, Division of Laborers International Union of North America, AFL-CIO. This grievance was denied as being "procedurally defective" in that it was not appealed from step 2 to step 3 in accordance with Article 15, Section 2 of the 1981 National Agreement. Since Petitioner's union representative(s) failed to perfect his appeal into the 3rd step of the procedure, Petitioner was precluded from

using the grievance procedure as a further avenue for redress.

In addition to Petitioner, there were 10 other postal employees who were issued removal notices by the Respondent at about the same time in 1984. Of the 11 issued removals, 10 were black, 1 was white, 6 were female and 5 were male. All 6 of the females who had been removed have been reinstated to employment with Respondent. The most striking fact is that 5 of the females, Carolyn Howard, Sylvia Brown, Andrena M. Elliott, Frances D. Crawford, and Shirley Rivers, had their removals modified and reduced to 14-day suspensions as the direct result of Respondent's volitional action in the second step of the grievance procedure, and not as the result of full-blown arbitration hearings involving disinterested arbitrators. The relief given to the 5 female employees was not the result of decisions of arbitrators, but rather was the result of actions over which the appellee agency had full control. Unlike Petitioner, the 5 female employees named above were charged not only with GAMBLING ON POSTAL PREMISES in violation of Chapter 661.56 of the Postal Service's Code of Ethical Conduct, but they were also charged with an additional offense, FAILURE TO COOPERATE IN AN OFFICIAL INVESTIGATION BY POSTAL INSPECTORS, in violation of Chapter 666.6 of the Postal Service's Code of Ethical Conduct. It is noteworthy that the 5 female employees who were charged not only with the same offense as was Petitioner, but with an additional offense, had their removals reduced to 14-day suspensions, while Petitioner, being charged with less, was not given the

opportunity to resolve his grievance in the second step of the grievance procedure.

On May 18, 1984, Petitioner filed his informal EEO charge with the Respondent's EEO counselor, in which he alleged that he had been discriminated against because of his sex (male) and his race (black) in that he was issued a Notice of Removal. Subsequently on June 23, 1984, his EEO counsellor prepared his formal EEO complaint. Petitioner assumed that his formal complaint would be a continuation of the sex and race charges he had originally brought in the informal stage. However, the EEO counselor erred in omitting the sex discrimination claim in the formal complaint. A formal investigation of the charge ensued, and ended with a disposition that Respondent had not discriminated against Petitioner in removing him. In November, 1985, Petitioner then availed himself of a hearing before a hearing examiner from the Equal Employment Opportunity Commission pursuant to 29 C.F.R. Section 1613.218 of the Equal Employment Opportunity Commission's regulations. The hearing examiner issued a bench decision adverse to Petitioner, and involving only the issue of race discrimination. Despite Petitioner's belief that the issue of sex discrimination was also being considered by the hearing examiner, the fact was that it was not.

In the instant matter, Petitioner's file includes a copy of his Informal Complaint of Discrimination in the Postal Service. This document was signed by Mr. Robert McWilliams, and dated July 16, 1984. Under "Type of Discrimination Alleged" is listed "Race, Sex". Under the part of the Informal Complaint captioned "Allegation" appears the statement, "Complainant

(Petitioner) alleges that he has been discriminated against because of his "sex (male) and race (Black) in that he was issued a Notice of Removal."

Subsequently, the formal complaint prepared by EEO counselor R. McWilliams and dated 6/23/84, indicated race (Black) as the only type of discrimination alleged. There is no explanation why the EEO Counselor, Mr. McWilliams, did not include "sex" as a basis in the formal complaint in addition to race. Based on his discussions with Mr. McWilliams, Petitioner had reason to believe that his complaint would be processed on the bases of both race and sex.

Subsequently, by letter dated September 27, 1984, Ms. Celestine Green, Manager, Equal Employment Opportunity Branch, advised Petitioner that his complaint would be investigated by Ms. J.B. Hill. Ms. Green, on September 27, 1984, also sent separate letters to Mr. R.L. Payne, MSC Manager/Postmaster at Cleveland, Ohio, and to Mr. Victor DiMaio, MSC Director, E & LR, Cleveland, Ohio, advising them that an Equal Employment Opportunity Investigation would be conducted on October 17, 1984. It is significant to point out that next to the statement "Type of Complaint" in Ms. Green's letters makes reference to "Race/Sex".

The Hearing Examiner, through a reasonable perusal of the investigative file, was certainly on notice that sex discrimination was an issue; he should have made inquiry as to whether or not sexual discrimination was an issue with a view to requesting a reinvestigation of such issue, as envisioned by 29 CFR 1613.218 (b) in order to have brought out pertinent

facts as envisioned in (c) (2) of Section 1613.218. Only by considering the sexual discrimination issue, and reflecting such in the record could the hearing examiner have made the appropriate correction to safeguard the rights of Petitioner; this the hearing examiner failed to do.

By decision dated February 14, 1986, the Respondent adopted the findings of EEOC's hearing examiner. Petitioner appealed the decision to the EEOC's Office of Review and Appeals, which upheld the agency's final decision in July, 1987.

On November 26, 1986, after passage of more than 180 days after Petitioner's appeal to the EEOC's Office of Review and Appeals, Petitioner filed suit in U.S. District Court for the Northern District of Ohio, under Title VII of the 1964 Civil Rights Act, as amended, to obtain relief from Respondent based on claims of race and sex discrimination.

On August 31, 1987, the United States District Court for the Northern District of Ohio issued an Order granting summary judgment for the Respondent under Rule 56, Federal Rules of Civil Procedure finding no racial discrimination and that Petitioner failed to exhaust his administrative remedies. On October 29, 1987, Petitioner filed an appeal with the U.S. Court of Appeals for the Sixth Circuit on the basis of only his sex discrimination claim. This matter presents important questions under Title VII of the 1964 Civil Rights Act involving the complex scheme governing rights of employees of the federal government, and the corresponding duties of those responsible for ensuring that congressionally-enacted

rights are safeguarded, and that such rights are not sacrificed for the sake of bureaucratic convenience.

Both questions sought to be reviewed in the herein appeal were raised in the District Court and the Appellate Court. The Respondent raised the questions of Petitioner's failure to exhaust his administrative remedies and his failure to establish a prima facie case of sex discrimination in their motion for summary judgment in the District Court. Petitioner filed an Answer Brief opposing the Motion for Summary Judgment. However, the District Court granted summary judgment in favor of the Respondent on both issues. Petitioner previously raised the exhaustion and the prima facie issues to the Sixth Circuit Court of Appeals. The appellate court affirmed the district court's order. On November 1, 1988, the U.S. Court of Appeals for the Sixth Circuit affirmed the District Court's decision.

REASONS FOR GRANTING THE WRIT

There are three Reasons why the Writ should be granted:

I. THE SIXTH CIRCUIT ERRED IN ITS APPLICATION OF THE "EQUITABLE ESTOPPEL" DOCTRINE AS APPLIED TO THE RESPONDENT, A GOVERNMENT ENTITY. THE LOWER COURT APPLIED THE HOLDING IN BERGLAND AS AN ABSOLUTE BAR TO FINDING EQUITABLE ESTOPPEL AGAINST THE GOVERNMENT. THE FACTS OF BERGLAND AND OTHER CASES CITED IN BERGLAND SET FORTH THAT EQUITABLE

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II. THE BASIC CORE REQUIREMENT FOR THE EXHAUSTION OF REMEDIES IN A TITLE VII ACTION IS NOTICE. THIS IS THE SPECIFIC LEGISLATIVE INTENT OF THE STATUTE. HOWEVER, THE LOWER COURT COMPLETELY DISREGARDED THIS INTENT BY ERECTING A MASSIVE OBSTACLE TO ACCESS TO THE COURTS. THE EXHAUSTION RULE IS NOT AN END IN ITSELF. IT IS A PRACTICAL AND PRAGMATIC DOCTRINE THAT MUST BE TAILORED TO FIT THE PECULIARITIES OF THE ADMINISTRATIVE SYSTEM CONGRESS HAS CREATED. EXHAUSTION UNDER TITLE VII, LIKE OTHER PROCEDURAL DEVICES, SHOULD NEVER BE ALLOWED TO BECOME SO FORMIDABLE A DEMAND THAT IT OBSCURES THE CLEAR CONGRESSIONAL PURPOSE TO ROOT OUT EVERY VESTIGE OF EMPLOYMENT DISCRIMINATION WITHIN THE FEDERAL GOVERNMENT.

THE SUBSTANTIAL QUESTION IS THAT THE LOWER COURT MISINTERPRETED THE

OBJECTIVE OF THE STATUTE AND PERMITTED INJUSTICE BY REQUIRING IN THE NAME OF EXHAUSTION MORE OF PETITIONER THEN HE HAD ALREADY DONE.

Raymond B. Rhone, Jr. (Petitioner), was notified by a letter dated March 26, 1984, that his employment as a mail handler was being terminated effective April 30, 1984, for the offense of gambling on United States Postal Service (Respondent) premises, a violation of Chapter 661.56 of the Postal Service Code of Ethics.

Whereupon Petitioner filed a grievance with the union which was denied because of a "procedural defect" caused by his union representative who neglected to perfect his appeal into the third step of the procedure, thereby terminating Petitioner's redress rights. Then on May 18, 1984, Petitioner filed an informal EEO complaint with Respondent's EEO counselor alleging both sex (male) and race (black) discrimination. The informal complaint indicated that under section "Kind of Complaint" the boxes marked Sex "Male" and Race or Color "Black" were both marked with an "X". On that same page, under the section captioned "Allegation" appeared the statement, "Complainant (Petitioner) alleges that he has been discriminated against because of his sex (male) and race (Black) in that he was issued a Notice of Removal.

Subsequently, the Formal Complaint prepared by the EEO counselor and signed by Petitioner dated June 23, 1984, omitted sex discrimination and only alleged race (Black) discrimination.

Petitioner argues that the Respondent was put on notice of both the sex and race discrimination allegations as stated in his informal complaint. The letter sent by the EEOC notifying the parties of the investigation date also mentioned both race and sex discrimination, so the Respondent was on notice that Petitioner charged both race and sex discrimination.

On August 31, 1987, the District Court for the Northern District of Ohio granted summary judgment to the Respondent on Petitioner's claim of sex discrimination based on his failure to exhaust his administrative remedies because the sex discrimination claim was not alleged in the formal complaint and because he could not establish a prima facie case of sex discrimination. The Court of Appeals affirmed the District Court's decision.

> "Pertinent legislative history teaches when Congress amended Title VII in 1972 to cover federal as well as private-sector employees, it was mindful that often times administrative complaints would be lodged by lay persons without benefit of legal assistance. By insisting in Section 717 (c) that a complaining employee seek relief within his agency in the first instance, Congress made certain that the agency would have the opportunity as well as the responsibility to right any wrong that it might have done. Congress did not, however, intend to erect a massive procedural roadblock to access to the courts." President v. Vance, 627 F.2d 353, 361-362 (D.C. Cir. 1980).

In the context of private-sector employment discrimination, the Supreme Court has held that Title

VII's exhaustion requirement should not be read to create useless procedural technicalities; "[s]uch technicalities," the Court admonished, "are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." President v. Vance, 627 F.2d 353, 362 (D.C. Cir. 1980) (citing Love v. Pullman Co., 404 U.S. 522 (1972)).

In President v. Vance, the District Court held that President, a federal employee, did not seek promotion as part of the relief sought in the administrative proceedings and therefore, President failed to exhaust his administrative remedies. The District Court granted summary judgment for the Department of State.

On appeal, the U.S. Court of Appeals, for the District of Columbia Circuit, reversed and declared that administrative complaints by private-sector employees are to be construed liberally since very commonly they are framed by persons unschooled in technical pleadings. President v. Vance, 627 F.2d 353, 362 (D.C. Cir. 1980) (citing Shehadeh v. Chesapeake & Potomac Telephone Co., 595 F.2d 711, 727 (D.C. Cir. 1978)).

Federal employees face identical obstacles, and there is no reason whatsoever for subjecting them to disparate treatment. Ibid.

The D.C. Circuit Court disagreed that the Department of State lacked adequate notice that President desired promotion. It cannot reasonably be expected that a lay complainant will always phrase his

prayer for relief so narrowly as to leave no question about what he seeks; indeed he may not even be aware of all of his legal rights or available remedies. President v. Vance, 627 F.2d 353, 362-363 (D.C. Cir. 1980).

The D.C. Circuit Court held that the exhaustion rule is not an end in itself; it is a practical and pragmatic doctrine that "must be tailored to fit the peculiarities of the administrative system congress has created." President v. Vance, 672 F.2d 353, 363 (D.C. Cir. 1980) (citing McKart v. U.S., 395 U.S. 185, 195 (1969)).

Exhaustion under Title VII, like other procedural devices, should never be allowed to become so formidable a demand that it obscures the clear congressional purpose of "rooting out ... every vestige of employment discrimination within the federal government." President v. Vance, 672 F.2d 353, 363 (D.C. 1980) (citing Hackley v. Roudebush, 520 F.2d 108 (D. C. Cir. 1975)).

Further, the D.C. Circuit Court believed that the complaint and other documents in the administrative records were more than adequate to put the State Department on notice that President believed that he had been subjected to racial discrimination adversely affecting his promotional opportunities, and that he considered promotion to GS-13 an appropriate form of relief.

Title VII plaintiffs are normally expected to exhaust administrative remedies. Brown v. General Services Administration, 425 U.S. 820, 823-33 (1976).

The plaintiff who fails to comply to the letter of the law with administrative deadlines "ordinarily will be denied a judicial audience." Shehadeh v. Chesapeake & Potomac Telephone Co., 595 F.2d 711 at 717-718 (D.C. Cir. 1978).

But in Brown v. Marsh, 777 F.2d 8 (D.C. Cir. 1985), the U.S. Court of Appeals for the District of Columbia Circuit also disagreed with the Army that these deadlines are absolute and insurmountable. Rather, the administrative deadlines in question were jurisdictional, functioning like a statute of limitations and subject to waiver, estoppel and equitable tolling. Brown v. Marsh, 777 F.2d 8, 14 (D.C. Cir. 1985) (citing Zipes v. TransWorld Airlines, 455 U.S. 385, 393 (1982)).

The existence of such excusing circumstances should be considered in light of the purpose of the doctrine of exhaustion of administrative remedies. Here the purpose of the doctrine was satisfied (giving the agency notice of a claim and opportunity to handle it internally), if the letter was not. Furthermore, Brown would be substantially and unfairly prejudiced if dismissal on exhaustion grounds were permitted. The D.C. District Court stressed that Title VII was devised as a measure that would be kept accessible to individuals untrained in negotiating procedural labyrinths. Brown v. Marsh, 777 F.2d 8, 14 (D.C. Cir. 1985) (citing Loe v. Heckler, 768 F. 2d 409, 417 (D.C. Cir. 1985)).

The Loe court made it clear that adequacy of notice is the core of Title VII administrative exhaustion requirements! Ibid.

Petitioner complied with the purpose of the exhaustion of administrative remedies by informing the EEO counselor of the alleged sex and race discrimination. Petitioner, a lay person, was not assisted by a legal representative; rather, he placed his trust and reliance on the EEO counselor to protect his legal rights. The EEOC likewise mentioned both race and sex discrimination in their letter of September 27, 1984, notifying the parties of the investigation. This letter is proof that the Respondent waived his objection to failure to exhaust administrative remedies. For this Court to uphold the lower court's decision would impose a severe burden on Petitioner (a lay person) who promptly notified his union representative of the sex discrimination but was prejudiced by that representative's error in failing to perfect his grievance appeal. Petitioner was further prejudiced by the formal complaint, prepared by the EEO counsellor, whom Petitioner had every reason to rely on, which omitted the sex discrimination claim. Under all these unique circumstances, dismissal on exhaustion grounds would contravene the remedial nature of Title VII and substantially and unfairly prejudice Petitioner.

In Curry v. United States Postal Service, 583 F. Supp. 34 (S.D. Ohio 1984), Curry like Petitioner reasonably relied on her EEO counselor. Brenda Curry, a postal service employee, relied on advice by Mr. Clarence Johnson, EEO Counselor, in not filing a separate complaint regarding her discharge. The U.S. District Court, S.D. Ohio, W.D., held that Curry would not be held to a strict reading of her informal complaint, which allegedly did not refer to handicap discrimination but which was prepared by Equal

Employment Opportunity Counselor. Otherwise, it would contravene the remedial nature of Title VII since Curry in fact properly brought her handicap discrimination claim to the counselor's attention. Ibid.

Further in Curry, the U.S. District Court denied summary judgment where employee's reliance upon both counselor and EEO counsel was reasonable, her alleged failure to exhaust her administrative remedies was excused and her charge of discrimination based upon her discharge was properly before the court under the doctrine of equitable tolling. Her reliance upon both Mr. Johnson and the EEO examiner was reasonable. Curry's alleged failure to exhaust her administrative remedies was excused because the alleged failure resulted solely from Curry's reasonable reliance on persons responsible for the proper administration of EEO complaints.

It is settled law that the doctrine of equitable tolling is available in Title VII cases. Ibid. 345 (citing Zipes v. TransWorld Airlines, 455 U.S. 385, 393 (1982)). Although Zipes involved a private employer, other cases have held that the doctrine is available in employment discrimination cases against the federal government. Ibid., 345 (citing Kizas v. Webster, 707 F. 2d 524, 543 (D.C. Cir. 1983)).

Equitable tolling is appropriate where plaintiff's failure to follow proper procedures flows from her reliance on statements or actions of those seemingly empowered by law to implement and enforce any discrimination statutes.

As in Curry, Petitioner likewise relied on the union representative and his EEO counselor and believed that both the race and sex discrimination charges that he related to his EEO counselor were being pursued. Applying Curry to the instant case, equitable tolling is appropriate and should be applied to excuse Petitioner's alleged failure to exhaust his administrative remedies. It is apparent that Petitioner has been substantially prejudiced by the summary judgment decision.

The lower court quickly and simply disposed of Petitioner's sex discrimination claim by stating that equitable estoppel generally is not available against the government and since the Respondent is a government entity, equitable estoppel is not available. Clearly, the lower court erred in transforming a general doctrine which sometimes secures an estoppel against the government into the absolute. Since the Respondent is a government entity, equitable estoppel is not permissible. A further reading of the cases establishes the lower courts error in their interpretation of the law. Generally, courts do not favor estoppel when the government is acting in a sovereign rather than proprietary role. Estoppel if applied might permit a misinformed or overly generous government official to give away assets or funds that the government holds for the public good. Heckler v. Community Health Service, 467 U.S. 51 (1984).

In Housing Auth. of Elliott County v. Bergland, 749 F.2d 1184 (1984), the government was providing grants for the purpose of realizing social goals, and therefore acting in its sovereign capacity. However, the Bergland case is clearly distinguishable from the instant case.

Bergland involved the government acting in a sovereign capacity involving grants of money. In the instant case, the governmental agency is the U.S. Postal Service, acting in a proprietary capacity. Because the Respondent acts in a proprietary manner, equitable estoppel against the government is permissible. Therefore, although the Supreme Court has refused to endorse the position that estoppel can never lie against the government, Heckler v. Community Health Service, 467 U.S. 51 (1984), the requirements for obtaining an estoppel in Brown v. Marsh, 777 F.2d 8 (D.C. Cir. 1985) are quite stringent. A 1985 case, citing General Accounting Office v. General Accounting Office Personnel Appeals Board, 698 F.2d 516, (D.C. Cir. 1983), suggested that estoppel generally will lie only when government officials engage in conduct that (1) "can be characterized as misrepresentation or concealment," or (2) "has caused or will cause an egregiously unfair result."

The Supreme Court in Schweiker v. Hansen, 450 U.S. 785 (1981), for example, reversed a Second Circuit decision holding that the Social Security Administration (SSA) was estopped to deny mother's insurance benefits to an applicant for failure to comply with the SSA's procedural requirement that such application be in writing.

Petitioner had sixteen (16) years of employment with the Respondent. Dismissal of this appeal will produce an egregiously unfair result, specifically, denial of any hope of reinstatement to his former position as a mailhandler with the Respondent. Applying the standards set forth in General Accounting Office v. General Accounting Office

Personnel Appeals Board implies that estoppel should apply to the Petitioner's case. Petitioner's EEO counselor erred in omitting the sex discrimination charge when drafting the formal complaint. In a letter dated September 27, 1984, Ms. Celestine Green, Manager of the Equal Employment Opportunity Branch advised Petitioner that his complaint would be investigated by Ms. J.B. Hill. On September 27, 1984, Ms. Green also sent separate letters to Mr. R.L. Payne, MSC Manager, Postmaster at Cleveland, Ohio, and to Mr. Victor DiMaio, MSC Director, E & LR, Cleveland, Ohio, advising them that an Equal Employment Opportunity Investigation would be conducted on October 17, 1984. It is important to note that next to the statement "Type of Complaint" in Ms. Green's letters reference is made to "Race/Sex". The Hearing Examiner, through a reasonable review of the investigative file, certainly was on notice that sex discrimination was an issue. From his examination of the record before him, he should have made direct inquiry of Petitioner as to whether or not sexual discrimination was an issue with a view to requesting a reinvestigation of such issue, as envisioned by 29 CFR 1613.218 (b) in order to have brought out pertinent facts, as envisioned in (c) (2) of Section 1616.218. A review of the EEOC hearing Transcript shows that the complaint examiner did not delve into the question of sexual discrimination.

In pertinent part, 29 CFR 1613.218 (b) commands the hearing examiner to consider the original copy of the investigative file, and he "shall" do this in making his recommended decision on the complaint; this provision goes on to state:

> "...the complaints examiner who shall review the complaint file to determine whether further investigation is needed before scheduling the meeting. When the complaints examiner determines that further investigation is needed, he shall remand the complaint to the Director of Equal Employment Opportunity for further investigation or arrange for the appearance of witnesses necessary to supply the needed information at the hearing. The requirements of Section 1613.216 apply to any further investigation by the agency on the complaint..."

Only by considering the sexual discrimination issue and reflecting such in the record could the hearing examiner have made the appropriate correction to safeguard the rights of Petitioner, and this is what the hearing examiner failed to do.

In conclusion, the EEO counselor's conduct misrepresented the discrimination claims of Petitioner and these actions caused an egregriously unfair result to Petitioner.

III. THE TRIAL COURT AND THE LOWER COURT CONTEND THAT PETITIONER COULD NOT ESTABLISH A PRIMA FACIE CASE. THEY WERE INCORRECT. UNDER THE PREVAILING CASE LAW IN A DISCRIMINATORY DISCHARGE CASE, ONCE THE PETITIONER HAS SHOWN THAT THERE WAS DISSIMILAR PUNISHMENT FOR SIMILAR CONDUCT BASED ON RACE OR GENDER THEN PETITIONER HAS SHOWN A PRIMA FACIE

CASE OF DISCRIMINATION AND SUMMARY JUDGMENT SHOULD NOT BE GRANTED. BY PERMITTING THE LOWER COURT RULING TO STAND, THE PETITIONER IS DENIED AN EVIDENTIARY TRIAL IN WHICH TO ESTABLISH THE MOTIVE AND PRETEXT FOR THE CONDUCT OF THE EMPLOYER.

ONCE THE INFERENCE OF RACIAL DISCRIMINATION EXISTS, THERE ARE GENUINE ISSUES OF MATERIAL FACT AS TO THE REAL REASONS FOR THE DISCHARGE AND SUMMARY JUDGMENT IS NOT WARRANTED. THE RESPONDENT MUST BE AFFORDED THE OPPORTUNITY TO ARTICULATE HIS LEGITIMATE, NON-DISCRIMINATORY REASON FOR THE DISCHARGE AND, MOST IMPORTANTLY, THE PETITIONER MUST HAVE THE OPPORTUNITY TO DEMONSTRATE THAT THE RESPONDENT'S PROFFERED REASONS ARE A PRETEXT FOR DISCRIMINATORY INTENT.

THERE IS SUBSTANTIAL CONFLICTING EVIDENCE ON BOTH OF THESE POINTS IN THE INSTANT CASE AND, THEREFORE, THESE QUESTIONS MUST BE RESOLVED AT TRIAL WHERE FULL COMPETENT EVIDENCE CAN BE INTRODUCED.

The first inquiry in all cases brought under Title VII is whether plaintiff has met the initial burden of establishing a prima facie case that his employer discriminated against him because of his race, color, or sex.

A prima facie case of disparate treatment under Title VII must establish by a preponderance of the evidence that the defendant took action affecting plaintiff's compensation, terms, conditions or privilege of employment under circumstances which give rise to an inference of unlawful discrimination. Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).

Thus, the prima facie case focuses upon the primary factual inquiries of any disparate treatment case: "[whether] the defendant intentionally discriminated against the plaintiff", and whether the employer treats people less favorably than others because of race, color, religion, sex or national origin. United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 715 (1983) (quoting Burdine, 450 U.S. 248, 253 (1981)).

The Supreme Court first set forth a model for a prima facie case of disparate treatment based on racial discrimination in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). The McDonnell court, however, never intended that this identical framework be applied to all disparate treatment cases. The prima facie case method established in McDonnell was never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination. United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 715 (1983).

Petitioner takes notice that this court and lower courts apply the standards and procedures established

in McDonnell Douglas to both race and sex discriminatory discharge cases under Title VII.

In the instant case, Petitioner has alleged discrimination on sex grounds and it is his burden to establish a prima facie case. Specifically, Petitioner must establish under McDonnell Douglas, by a preponderance of the evidence, that (a) he belongs to a minority, Black Male, (b) he was qualified for his position as a mail handler with the Respondent, (c) he was disciplined and discharged for violation of Respondent's regulations, and (d) the position remained open.

Here the facts clearly establish that Petitioner has met his initial burden of establishing a prima facie case of sex discrimination. Specifically, Petitioner can satisfy the criteria that he is a member of a protected class, a black male. Second, Petitioner's sixteen years of experience as a mail handler highly qualified him for that position. Prior to this incident, Petitioner had a satisfactory work record with the Respondent. Third, the Respondent disciplined Petitioner by issuing a letter to him dated March 26, 1984, informing him that his 16 years of employment with Respondent was terminated effective April 30, 1984, for the offense of gambling on postal premises. Most important, Petitioner can show that employees not of his protected group who also engaged in gambling on the postal premises were not comparably punished. Specifically, in addition to Petitioner, ten other postal employees were also issued termination notices by the Respondent at about the same time in 1984. Of the ten employees, six (6) were female and five (5) were male. However, all six (6) females were reinstated to employment with

the Respondent. Five (5) of these females, specifically Carolyn Howard, Sylvia Brown, Andresa Elliott, Frances D. Crawford, and Shirley Rivers, had their removals modified and reduced to 14-day suspensions in the second step of the grievance procedure. All of the modifications in discipline regarding the females resulted from Respondent's voluntary actions during the grievance procedure. There were no arbitration hearings for the females. In contrast, Petitioner's case proceeded to a full-blown arbitration hearing. While Petitioner was charged with gambling on postal premises, the five female employees previously named were charged with gambling on postal premises and also the additional offense of failure to cooperate in an official investigation by postal inspectors, a violation of Chapter 666.6 of the Postal Service's Code of Ethical Conduct. It is important to emphasize here that while Petitioner's employment was terminated for the single offense of gambling on Respondent's property, the five female employees who were charged with two offenses had their removals reduced to 14-day suspensions. Clearly the Respondent punished Petitioner more severely than all six of the female employees. None of the females' employment was permanently terminated. The final result for Petitioner, however, was that his 16-year career with the Respondent was terminated for a single offense. Fourth, the position of mail handler remained open.

In McDonnell Douglas, Green, a black civil rights activist engaged in disruptive and illegal activity against his employer, McDonnell Douglas. Green has participated in a carefully planned "stall-in" designed to tie up access on an egress from McDonnell Douglas's plant at a peak traffic hour. This unlawful

activity was specifically directed at this employer. However, the U.S. Court of Appeals for the Eighth Circuit held that Green carried his burden of establishing a prima facie case of racial discrimination. However, this Court found that the lower court erred in holding that petitioner had not discharged its burden of proof in rebuttal by showing that its stated reason for the refusal to rehire Green was based on Green's illegal activity and vacated the judgment and remanded the cause to the District Court for further proceedings. The Eighth Circuit stressed that Green must be afforded a fair opportunity to prove that McDonnell Douglas' stated reason was just a pretext for a racially discriminatory decision, such as by showing that whites engaging in similar illegal activity were retained or rehired by McDonnell Douglas. Further, the Eighth Circuit Court stressed that Green must be afforded a fair opportunity to show that McDonnell's stated reason for Green's rejection was in fact a pretext. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Especially relevant to such a showing would be evidence that white employees involved in acts against McDonnell Douglas of comparable seriousness to the "stall-in" were nevertheless retained or rehired. McDonnell Douglas may justifiably refuse to rehire one who was engaged in unlawful or disruptive acts against it, but only if this criterion is applied alike to members of all races. It is noteworthy that McDonnell Douglas recognizes that an employer is not compelled to absolve and rehire an employee who has engaged in deliberate, unlawful activity against it provided that the employer treats all employees regardless of race comparably.

As was previously stated, Petitioner was charged with one unlawful offense and the six females were charged with two offenses. Applying the criterion in McDonnell to the instant case, the Respondent would have been completely justified in terminating Rhone and all six females for engaging in unlawful activity on postal premises. However, the evidence substantiates that the Respondent disciplined Petitioner, a male, and the six women in a dissimilar manner based on sex. Clearly under the McDonnell Douglas case, Petitioner met the initial burden of proving a prima facie case and should be afforded the same opportunity as Green was afforded to have his case remanded so that he would also be afforded the opportunity to present competent evidence to prove that the Respondent's presumptively valid reason was merely a pretext for a sexually discriminatory decision by the Respondent.

In a recent Sixth Circuit case, Beaven v. Commonwealth of Kentucky, 783 F.2d 672 (6th Cir. 1986), Mr. Clarence Beaven, a black male, was dismissed from his employment with the Commonwealth of Kentucky in the Department of Community and Economic Development for violation of travel regulations, specifically, misuse of an official car beyond state borders, unauthorized departure from a weekly itinerary, and lying to a supervisor about his location. Mr. Beaven filed suit in the U.S. District Court for the Eastern District of Kentucky alleging that his dismissal was due to racially discriminatory disparate treatment by the Department of Community and Economic Development. Mr. Beaven contended that program advisors routinely deviated from their itineraries without prior approval and that the Director knew of and tolerated these routine, unapproved

deviations including the practice of driving state cars over state borders for short trips. The U.S. District Court for the Eastern District of Kentucky concluded that plaintiff had not established a prima facie case of discriminatory discharge and granted summary judgment. Beaven had presented evidence that similarly situated white program advisors who committed the same infractions had been given warnings or received hearings and were not fired. The Sixth Circuit in Beaven stated when Beaven's presented this evidence of disparate treatment it was sufficient to give rise to an inference of discrimination and constituted a prima facie case of discriminatory discharge. In summary, the District Court erred in granting summary judgment and the case was remanded for further proceedings.

The facts in the Beaven case are similar to those in the instant case. Both Beaven and Petitioner were black and violated their employers' regulations. Beaven was dismissed for conduct while whites were not dismissed for comparable conduct. Petitioner is a black male who was dismissed for conduct while females were not dismissed for several infractions which were more serious. As in Beaven, Petitioner's evidence of disparate treatment is sufficient to give rise to an inference of sex discrimination and constitutes a prima facie case of discriminatory discharge.

In a similar factual situation to the instant case, Evans v. Interstate Brands Corp., 557 F. Supp. 562 (N.D. Ga. 1983), Evans, a black man, was discharged after he and his white supervisor, Morgan, were involved in a fight, a violation of #8 Company Rule of Conduct prohibiting fighting on company premises. It

was undisputed that the white supervisor, Morgan, was not fired for fighting at the time Evans, a black employee, was fired for fighting. Interstate Brands Corp.'s motion for summary judgment was denied. The Evans court suggested that as long as a minority employee is discharged under circumstances in which a non-minority employee would not have been or in fact was not discharged, there exists a genuine issue of material fact as to the real reason behind the termination of the minority employee. In any situation in which a black employee is fired while a white employee is retained "under apparently similar circumstances", the fact of dissimilar punishment for similar conduct raises an inference of racial discrimination sufficient to preclude the granting of summary judgment in favor of the employer. Because genuine questions of fact exist as to the real reasons for Evans' discharge, summary judgment is not warranted. Ibid. The company must be permitted to articulate any legitimate nondiscriminatory reasons it may have for Evans' discharge, and Evans must then have the opportunity to demonstrate that the company's proffered reasons are a pretext for discriminatory intent.

The U.S. District Court, for N.D. of Georgia, further cited that the Fifth Circuit has noted, summary judgment is especially inappropriate in employment discrimination cases, which usually involve questions of motive and intent. Bullard v. O.M.I. Georgia, Inc., 640 F.2d 632, 634 (5th Cir. 1981). According to the decision in the Evans case, the dissimilar punishment for similar conduct in the instant case raises the inference of discrimination (sex instead of race)

sufficient to preclude the granting of summary judgment.

By establishing a prima facie case, the plaintiff in a Title VII action creates a rebuttable "presumption that the employer unlawfully discriminated against" him. Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). To rebut this presumption, "the defendant must clearly set forth through the introduction of admissible evidence, the reasons for the plaintiff's rejection." Ibid.

In Loeffler v. Carlin, 780 F.2d 1365 (8th Cir. 1985), Theodore Loeffler sued the Postmaster General of the U.S. Postal Service (U.S.P.S.) under Title VII for discriminatory discharge on the basis of his sex. Loeffler, a male rural carrier, was discharged as a result of his method of organizing "boxholder" mail prior to beginning his delivery route. A prohibition against the casing of boxholder mail was implemented in August, 1979, by U.S.P.S. headquarters in Washington. The rule against casing was violated openly by Loeffler and the two (2) female carriers. Loeffler and the two female carriers committed violations in roughly the same frequency, and made no attempts to conceal their actions, which in all cases were performed in plain view of their supervisors. The U.S.P.S. introduced testimony that Loeffler's admittedly harsher and more frequent punishment and ultimate discharge occurred because he was observed violating the anti-casing rule more frequently than the females. Loeffler was discharged for the same offense committed by two similarly situated women; that one of the women was not disciplined at all; that the other woman received lesser penalties

than those imposed upon Loeffler and that the U.S.P.S.'s asserted justification for the disparate treatment accorded to Loeffler was pretextural.

The District Court applied the well-established standards set forth in McDonnell Douglas and found that Loeffler had established a prima facie case of discriminatory discharge by showing the Loeffler and the two females violated the "no casing" rule openly at every opportunity, that management had equal opportunity to observe all violations of the rule, and that Loeffler was discharged for his actions while neither of the two female employees received discipline of comparable severity. While the U.S.P.S. articulated a legitimate, nondiscriminatory reason for the disparity in treatment -- that Loeffler's harsher treatment and discharge resulted because he was the only carrier caught frequently violating the rule and that punishment was meted out according to the number of violations observed -- the trial court decided that Loeffler had demonstrated that the articulated reason was mere pretext. The Court of Appeals for the Eighth Circuit held that the employee's discharge was an act of discrimination based on his sex. It was noted that the U.S.P.S. had to apply methods of discipline equally to all violators and not protect violators because of their gender. Ibid. Loeffler petitioned this Court for a writ of certiorari concerning the Court of Appeals' denial of prejudgment interest against the U.S.P.S. This Court reversed and remanded only on the issue of prejudgment interest. The Court held that prejudgment interest could be awarded in suits against the Postal Service brought under Title VII of the Civil Rights Act. Loeffler v. Frank, _____ U.S. _____, 108 S.Ct. 1965 (1988).

In Tate v. Weyerhaeuser Co., 723 F.2d 598 (8th Cir. 1983, cert. denied), the Eighth Circuit Court stated that a plaintiff may show that the employer's proffered reason for discharge was not the real reason by "persuading the court that a discriminatory reason more likely motivated the employer" or by "showing that the employer's proffered explanation is unworthy of credence." Ibid., (quoting Burdine, 450 U.S. 248, 256 (1981). Simply, the court must decide which party's explanation of the employer's motivation it believes.

CONCLUSION

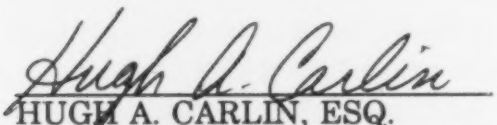
In Title VII sex discrimination cases concerning the requirement of exhaustion of the remedies, the defenses of waiver, tolling and equitable estoppel are applicable against the government when they are acting in a proprietary role and the negligent errors and omissions of their agents preclude the petitioner from properly exhausting his administrative remedies. Therefore, the lower courts erred in granting and affirming summary judgment for Respondent and denying the Petitioner a full evidentiary hearing in the District Court.

Further, the lower courts erred in granting summary judgment when Petitioner met his burden of establishing a prima facie case of sex discrimination in two ways: (1) under McDonnell Douglas, he met the four criteria for establishing a prima facie case of discriminatory discharge based on gender, and (2) under Beavan, Petitioner established the disparate treatment for similar conduct between black males and black females which gives rise to an inference of discrimination and constitutes a prima facie case of

discriminatory discharge precluding the granting of summary judgment.

For the reasons stated, this Honorable Court should issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit. Following review, that judgment should be reversed and the case should be remanded back to the United States District Court for the Northern District of Ohio for a trial on the merits.

Respectfully submitted,



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